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—IN THE—

Supreme Court of the United States.

OCTOBER TERM, 1902.

THE KANSAS CITY SUBURBAN BELT RAILWAY COMPANY, *Plaintiff in Error*,

vs.

ANDREW HERMAN, A MINOR, BY HIS NEXT FRIEND, MARTIN HERMAN, AND THE UNION TERMINAL RAILWAY COMPANY, *Defendants in Error.*

No. 321.

Brief of Plaintiff in Error in Opposition to the Motion of Defendant in Error to Dismiss or Affirm.

STATEMENT.

Andrew Herman, a minor, by his next friend, Martin Herman, both residents of the State of Kansas, brought this action in the Court of Common Pleas of Wyandotte county, Kansas, on September 18, 1897, against The Union Terminal Railway Company, a Kansas corporation,

and The Kansas City Suburban Belt Railway Company, a Missouri corporation, to recover ten thousand dollars for personal injuries.

The petition charged that The Union Terminal Railway Company "owned and operated" the railway in question; that the Kansas City Suburban Belt Railway Company "operated its trains upon and controlled the railway of the defendant The Union Terminal Railway Company;" and that a train operated by The Kansas City Suburban Belt Railway Company was negligently managed, resulting in the injury of the plaintiff (Rec., 1-3).

The Suburban Belt Railway Company, upon the answer day, filed its petition and bond for removal upon the ground of a separable controversy (Rec., 4). The State Court denied the petition for removal (Rec., 7), and the case went to trial.

The plaintiff offered no evidence at all tending to prove a cause of action against the defendant Union Terminal Railway Company, and the court, at the close of plaintiff's evidence, sustained the demurrer filed by that company, and at once rendered final judgment against the plaintiff and in favor of The Union Terminal Railway Company (Rec., 10–17).

The Kansas City Suburban Belt Railway Company immediately upon the sustaining of the demurrer and the rendition of final judgment, and before any further proceedings were had, filed its petition and bond for removal. The petition for removal was verified and con-

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tained the usual averments of diversity of citizenship, amount in controversy and a recital of the prior proceedings (Rec., 12). It also contained the following direct averment: "And the defendant further says that no evidence was offered or introduced by plaintiff or attempt made to show a cause of action against The Union Terminal Railway Company; that said Union Terminal Railway Company was joined with this defendant fraudulently and for the sole purpose of preventing a removal of this cause to the Circuit Court of the United States, with no purpose or intent of attempting to show any cause of action against it" (Rec., 13).

Plaintiff's counsel thereupon filed his affidavit, stating that the suit was brought in good faith against both defendants and giving as a reason why no evidence was offered against The Union Terminal Railway Company that he was disappointed in obtaining the attendance of some witness whose testimony "if introduced would have tended to prove the joint liability of said defendants;" and also stating some misunderstanding between counsel as to the production of documents (Rec., 15-16).

The court again overruled the application to remove, and the case proceeded against The Kansas City Suburban Belt Railway Company alone, and resulted in a disagreement of the jury (Rec., 16).

Afterwards the plaintiff filed his amended petition against The Kansas City Suburban Belt Railway Company alone, reducing the *ad*

damnum to $1,999 (Rec., 17), and a trial was had, resulting in a verdict for plaintiff in the sum of $1,500 (Rec., 28). An appeal was taken to the Kansas Court of Appeals, and thence to the Supreme Court of Kansas, which affirmed the judgment of the lower court; thereupon this writ of error was sued out to review the action of the state court in denying the application for removal filed after the court had sustained the demurrer of The Union Terminal Railway Company and rendered judgment in its favor and before any further proceedings were had.

BRIEF AND ARGUMENT.

I.

The court has jurisdiction to determine the question raised in this record.

The question presented by this record is whether the railway company was entitled to remove this suit from a state to the Federal court after plaintiff had rested his case, having failed to offer any evidence whatever against the resident defendant The Union Terminal Railway Company, and after the court had sustained the demurrer of that company and rendered final judgment in its favor and against the plaintiff. The state court refused the removal. Under these circumstances, this court has jurisdiction to determine whether there was error on the part of the state court in retaining the case.

Missouri, Kansas & Texas Ry. Co. v. *Hickman*, 22 Sup. Ct. Rep., 18;
Removal Cases, 100 U. S., 457;
Stone v. *South Carolina*, 117 U. S., 430;
Missouri Pacific Ry. Co. v. *Fitzgerald*, 160 U. S., 556.

II.

The failure of the plaintiff below to offer any testimony against The Union Terminal Railway Company was an abandonment of its case against that company and equivalent to a dismissal. The case thereupon became removable and the state court erred in refusing to grant the application made therefor.

An application to remove may be made when the case first becomes removable, even though

made during the trial; if the plaintiff increases the *ad damnum* so as to bring the case within the jurisdiction of the Federal court; or if the plaintiff voluntarily dismisses the action as to the resident defendant, leaving a controversy between citizens of different states.

Powers v. *Chesapeake & Ohio Ry. Co.*, 169 U. S., 92;

Northern Pacific Ry. Co. v. *Austin*, 135 U. S., 315.

In the former case the Court said:

> The reasonable construction of the act of Congress, and the only one which will prevent the right of removal, to which the statute declares the party to be entitled, from being defeated by circumstances wholly beyond his control, is to hold that the incidental provision as to the time must, when necessary to carry out the purpose of the statute, yield to the principal enactment as to the right; and to consider the statute as, in intention and effect, permitting and requiring the defendant to file a petition for removal as soon as the action assumes the shape of a removable case in the court in which it was brought.
>
> The result is that, when this plaintiff discontinued his action as against the individual defendants, the case for the first time became such a one as, by the express terms of the statute, the defendant railway company was entitled to remove; and therefore its petition for removal, filed immediately upon such discontinuance, was filed in due time.

If the plaintiff had voluntarily dismissed his action as to The Union Terminal Railway Company, then it must be conceded, in view of the rule established in the Powers case, that

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the cause would thereupon have become removable; and an application made for that purpose would have been timely, and it would have been error on the part of the state court to refuse it.

Instead of voluntarily dismissing his action as to that company, the plaintiff omitted to offer any evidence tending to prove a cause of action against it, and the court promptly sustained the demurrer and rendered final judgment in its favor. Is that not equivalent to a dismissal, so far as the right of removal is concerned?

It is submitted that such voluntary *abandonment* by plaintiff of his claim against the resident defendant is the same in legal effect as a voluntary *dismissal*. Is there any distinction to be drawn between a voluntary dismissal by the plaintiff and a demurrer sustained by the court because plaintiff *voluntarily abandons his claim* and purposely fails to introduce any evidence? Is not the failure to introduce any evidence a *confession* that the case ought to be dismissed.

Let us assume that a resident of Kansas desires to sue a non-resident corporation in the local courts of that state, and for some reason is anxious to avoid a removal to the Federal court. He joins with the non-resident corporation any one of the million and a half residents of Kansas, alleges a joint liability and proceeds to trial. He is careful not to dismiss as to the resident defendant, because he knows that to do so would render the cause at once removable. He,

therefore, introduces his proof against the non-resident defendant, but is unable, as he well knows, to offer any evidence against the resident defendant. The court, at the close of plaintiff's evidence, promptly sustains the demurrer of the resident defendant and renders final judgment in his favor. The case then proceeds to judgment against the non-resident defendant. Does this court hold that the right of removal may be defeated in this way? If so, then the right of removal is judicially expunged from the statute book. It was said by Mr. Justice Miller, in *Arapahoe Co.* v. *Railway Company,* 4 Dill., 277, in speaking of the right of removal, that the court should "be astute not to permit devices to become successful which are used for the very purpose of destroying that right."

It is said by plaintiff's counsel in his affidavit that he expected to introduce evidence against the Union Terminal Railway Company, but was prevented by the absence of a witness and by a misunderstanding with opposing counsel. But no request was made for a continuance, and no effort made to supply the alleged missing evidence. By proceding under these circumstances, the plaintiff *abandoned* his case against the Union Terminal Railway Company and confessed its non-liability by offering no testimony against it. The plaintiff ought then to have dismissed his action as to that company. Had he done so, the cause would, of course, have been removable. Is the plaintiff, therefore, to profit by failing to do that which he should have done?

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III.

The case of Whitcomb v. Smithson is not conclusive of the case at bar.

Defendant in error relies most strongly upon the case of *Whitcomb* v. *Smithson,* 175 U. S., 635. In that case, as stated by the court, "the joint liability was insisted on here *to the close of the trial,* and the non-liability of the railway company was ruled *in invitum.*" The case there did not stop as to the railway company upon the close of the plaintiff's testimony. The case proceeded to a verdict, and the jury, under the instructions of the court, returned a verdict in favor of the railway company. The case as to all defendants was finally submitted to the jury. There was, as stated by the court, "a ruling on the merits."

In the Whitcomb case, there were two features which distinguish it from the case at bar: (a) *The case proceeded to verdict and judgment as against all of the defendants.* The railway company was not *eliminated* from the case at the close of the plaintiff's testimony, as in the case at bar. (b) The ruling of the court in the Whitcomb case was on the *merits*; from which we may infer that there was a *bona fide* effort made to introduce testimony against the railway company, which failed only because the court as a matter of law deemed the proof insufficient to warrant a judgment, whereas in the case at bar there was no attempt whatever to offer any testimony of any kind against the Union Terminal Railway Company.

IV.

Under the Kansas Statute, when the demurrer was sustained and judgment rendered, the Union Terminal Railway Company ceased to be a party to the action and the case became removable.

In this connection it is important to note the provisions of the statutes of Kansas referring to judgments.

Sec. 389 General Statutes of Kansas of 1897, is as follows: "A judgment is the final determination of the rights of the parties in an action."

Sec. 391 is as follows: "In an action against several defendants, the court may in its discretion render judgment against one or more of them, *leaving the action to proceed against the others* whenever a several judgment may be proper."

It is thus seen that the action of the state court in sustaining a demurrer and rendering final judgment at the close of plaintiff's evidence had the effect to eliminate the Union Terminal Railway from the case. It was no longer a *party* to the cause. The plaintiff concedes this view to be correct, since in filing its amended petition thereafter, the Kansas City Suburban Belt Railway Company was the sole defendant.

The case, as it then stood, was between the plaintiff, a resident of Kansas, and the Kansas City Suburban Belt Railway Company, a resident of Missouri, and the amount involved exceeded, exclusive of interest and costs, the

sum or value of two thousand dollars. We submit that the case at that moment became removable for the first time, and that the application for removal should have been granted, and that the state court committed error in refusing it.

We most earnestly submit that the writ of error sued out herein was not taken for delay, and that the question raised by the record is not so frivolous as to need no further argument. We think a most serious question is raised, and that it is of sufficient moment to justify an oral argument and the careful consideration of the court.

V.

It is not important that the plaintiff afterwards reduced his demand to an amount below the jurisdiction of the Federal court, or that the state court retained the case and proceeded to trial, and that the plaintiff in error participated therein. These events occurring after the application for removal, do not affect the question of jurisdiction.

Powers v. *Ry. Co.*, 169 U. S., 102;
Black's Dillon on Removal of Causes, Sec. 192, and cases cited.

VI.

It is also submitted that as, under the practice of this court, the motion can not be passed upon without referring to the transcript, it

should be denied without prejudice, or continued until this cause is heard in its regular assignment.

Callan v. *Bransford*, 139 U. S., 197.

Respectfully submitted,

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